FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1977

ZENITH RADIO CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Customs and Patent Appeals (Pet. App. 57a–112a) is reported at 562 F. 2d 1209. The opinion of the Customs Court (Pet. App. 1a–50a) is reported at 430 F. Supp. 242. The decision of the Commissioner of Customs (A. 24–25) is reported at 41 Fed. Reg. 1298.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on July 28, 1977. The petition for a writ of certiorari was filed on October 11, 1977,

and was granted on February 21, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1256.

QUESTION PRESENTED

Whether the remission of the Japanese Commodity Tax, which is imposed on certain consumer electronic products only if they are sold in Japan, is a bounty or grant within the meaning of Section 303 of the Tariff Act of 1930.

STATUTE INVOLVED

Section 303(a)(1) of the Tariff Act of 1930, 46 Stat. 687, as amended, 19 U.S.C. (Supp. V) 1303 (a)(1), provides:

> Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

STATEMENT

In April 1970 petitioner, a domestic manufacturer of consumer electronic products, filed a petition (A. 139–150) with the Commissioner of Customs, requesting the Commissioner to assess countervailing duties, under Section 303 of the Tariff Act of 1930, 46 Stat. 687, as amended, 19 U.S.C. 1303, on various consumer electronic products exported from Japan.[1] Petitioner contended that the products benefited from bounties or grants paid or confered by the Government of Japan, because, *inter alia,* Japan imposes a tax on those products when they are sold in Japan but does not impose the tax when the products are exported.

The Japaneses Commodity Tax is an *ad valorem* tax (*i.e.*, a tax levied with respect to identified goods and calculated as a percentage of the value or sales price of the goods). It is imposed on certain consumer prod-

[1] In 1970 Congress provided a mechanism that enables interested persons to require the Secretary of the Treasury to determine whether countervailing duties should be imposed on imported articles. 19 U.S.C. 1516(a). Treasury regulations require the filing of petitions under the statute with the Commissioner of Customs. 19 C. F.R. 159.47(a).

A decision to impose countervailing duties always has been open to judicial review; in 1974 Congress made available judicial review of a decision not to impose countervailing duties. See 88 Stat. 2048, 19 U.S.C. (Supp. V) 1516(d). To take advantage of this provision, within 30 days of the publication of a determination not to impose duties, "such manufacturer * * * may commence an action in the United States Customs Court contesting such determination."

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ucts shipped in Japan.[2] The tax operates as a consumption tax and applies to goods regardless of their place of origin. If the products are manufactured in Japan, the tax is imposed when they are shipped from the factory; if they are imported into Japan, the tax is imposed when the products are withdrawn from the customs warehouse. The tax is not imposed on products made in Japan that are shipped from the factory for export.[3] In other words, the tax is remitted with respect to exports. ("Remission" of taxes, as used by the parties in this litigation, means either the failure to collect the Commodity Tax on exported articles or the refund to the exporter of taxes that have been collected. "Nonexcessive" remission means remission that does not exceed the amount of tax imposed.)

In January 1976 the Commissioner of Customs published a notice of final determination with respect to petitioner's petition (A. 24–25). The notice stated in relevant part that: "on the basis of the additional facts gathered and the investigation conducted pursuant to * * * Customs Regulations * * * a final determination * * * is hereby made * * * that * * * no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303

[2] Portions of the Japanese Commodity Tax statute are set forth at A. 44–48. The operation of the tax is not disputed here. Compare A. 14 with A. 30–31.

[3] If the tax is paid on the shipment of an article that is later exported, the tax is repaid to the exporter. A. 14; see also *An Outline of Japanese Taxes* 134 (1975) (prepared under the authority of the Tax Bureau of the Japanese Ministery of Finance).

* * * upon the manufacturer [sic], production, or exportation of certain consumer electronic products from Japan" (A. 25).

Petitioner then filed this suit in the Customs Court seeking review of the determination with respect to the remission of the Japanese Commodity Tax as it applied to certain Japanese consumer electronic products specified in the complaint (A. 8–29).[4]

The Customs Court granted petitioner's motion for summary judgment and denied our cross-motion (Pet. App. 1a–50a). Relying mainly on *Downs* v. *United States,* 187 U.S. 496, the court held that, as a matter of law, the remission of the Japanese Commodity Tax is a bounty or grant (Pet. App. 5a) and ordered the Secretary of the Treasury to determine the net amount of the bounty or grant and to impose a countervailing duty equivalent to that amount on all Japanese consumer electronic products specified in the complaint (Pet. App. 53a).

The Court of Customs and Patent Appeals reversed and remanded with directions to enter summary judgment for the United States. The court held, first, that *Downs* is not controlling because it did not involve the issue presented here—*i.e.,* whether the nonexcessive remission of a tax levied on a product, standing alone, is a bounty or grant within the scope of Section 303 (Pet. App. 66a). The court explained that *Downs*

[4] Petitioner's 1970 petition had alleged that a number of other Japanese practices also are bounties or grants under Section 303. Petitioner's complaint in the Customs Court did not challenge the negative determination with respect to those practices, and they are not at issue in this case.

involved a complex Russian scheme for the regulation of sugar that provided for both the remission of excise taxes when the product was exported *and* the issuance of valuable certificates to the exporter; the amount of the countervailing duty assessed was equal to the value of the certificates. As the court stated, the bounty "was found to reside in, and was measured by, an excess of the remission of excise taxes" (Pet. App. 67a n. 12).

The court held that nothing in the legislative history of the countervailing duty statute indicates Congress' intent to require the imposition of countervailing duties on the nonexcessive remission of the kind of taxes involved in this case (Pet. App. 70a); that the Secretary's interpretation of the statute had been adhered to since its first enactment (*id.* at 74a); and that many congressional actions since the interpretation was adopted demonstrated that Congress has ratified the Secretary's interpretation (*id.* at 76a–82a).

Two judges dissented on the ground that the case is controlled by previous decisions of this Court, particularly *Downs* (Pet. App. 84a–112a).

SUMMARY OF ARGUMENT

A. The countervailing duty statute is designed to cancel the competitive advantage that a foreign producer achieves when the foreign nation subsidizes exports. The noncollection on exports of a tax levied on domestic consumption does not subsidize exports; it is essentially neutral. The Secretary of the Treas-

ury therefore has taken the position for 80 years that the remission of an indirect tax (*i.e.*, a tax levied on the goods themselves and measured by their price or cost rather than by the income or wealth of the purchaser or seller) is not a "bounty or grant" on exports.

Petitioner argues that the bounty on export lies in the difference between the domestic (taxed) price in Japan and the untaxed export price. But a moment's reflection shows that there is a fundamental difference between the failure to tax a good and the provision of a subsidy; in the former case, the foreign goods can compete with United States goods on an equal footing, whereas in the latter the foreign goods obtain a competitive advantage. The countervailing duty statute is intended to offset the advantage conferred by a subsidy, not to require the United States to collect the same sort of tax that Japan desires to impose on goods consumed there.

Indeed, the imposition of countervailing duties in circumstances like those of this case would lead to double taxation: the foreign goods would be priced at their cost of manufacture, plus the countervailing duty, plus the sales tax of the state where they were sold, while domestic goods would be priced at their cost of manufacture plus only the sales tax. That would put foreign goods at a disadvantage in addition to the disadvantage already imposed by tariffs and transportation costs. That is not the purpose of the countervailing duty statute.

B. The legislative history of the countervailing duty statute, which petitioner does not mention, demonstrates that Congress understood that a "bounty or grant" would not include the exporting country's remission of indirect taxes, but would encompass only payments in excess of such remissions.

C. The Secretary has consistently interpreted and applied the countervailing duty statute as not applying to remissions of indirect taxes. Congress, with knowledge of that interpretation, has reenacted the statute five times without changing the relevant language. As a result of the administrative practice and the congressional reenactments of the statute, the Secretary's position has become an essential premise on which international trade is conducted. A change in the rule would disrupt trading and cause economic dislocations; it would undoubtedly lead to retaliation against American exports. Those facts, which petitioner does not deny, provide significant additional support for the Secretary's interpretation.

D. *Downs* v. *United States,* 187 U.S. 496, on which petitioner relies almost exclusively, is not inconsistent with the Secretary's interpretation and does not control this case. Neither *Downs* nor any other case dealt with the question whether a countervailing duty should be applied on the nonexcessive remission of indirect taxes. Indeed, consistently with the Secretary's practice, a countervailing duty was not imposed on the nonexcessive remission of indirect taxes on the products involved in *Downs,* and the Court's opinion

strongly suggests an endorsement of the Secretary's practice.

E. The court below correctly directed that summary judgment be entered for the United States. As petitioner admits, the issue is one of law, and the factual underpinnings of the Secretary's interpretation of the statute were never challenged by petitioner in this case. In any event, the issue does not turn on a factual determination of the exact economic consequences of a remission of indirect taxes in each particular case, and it would be difficult to administer the statute if such a determination were required. The open question is whether the classification that the Secretary has adopted to implement the statute is reasonable in light of the legislative purpose and understanding. The considerations on which that classification is based demonstrate that it is reasonable and consistent with the statute.

ARGUMENT

THE FAILURE OF JAPAN TO COLLECT A TAX ON EXPORTED ARTICLES IS NOT A BOUNTY OR GRANT

A. THE NONCOLLECTION OF AN INDIRECT TAX IS NEUTRAL WITH RESPECT TO EXPORTS

Section 303 of the Tariff Act provides that the United States shall impose countervailing duties to offset any "bounty or grant" given by an exporting nation with respect to any export. The statute was intended, as the parties agree, to counteract subsidies of exports. An express subsidy is the clearest example. If the cost of producing corn in Europe were $1.00 per bushel, and Germany paid farmers $.10 for every

bushel exported, that would be a bounty or grant. If corn cost $.95 to produce in the United States, the bounty would allow German farmers to sell their corn at a profit in the United States, while corn grown here, although cheaper to produce, would cost more to sell. The countervailing duty of $.10 would restore the market to its original condition by cancelling the advantage of the bounty on exports.

Since the countervailing duty law was first enacted in its present form in 1897, 30 Stat. 205, the Department of the Treasury has unswervingly taken the position that only a subsidy of some sort is a bounty or grant, and that a nation's decision not to collect an excise tax on exports is not a subsidy of exports, even though an excise or indirect tax may be collected with respect to goods consumed in that nation.[8]

Some illustrations may make clear both the Secretary's position and the reasons why the noncollection of a commodity tax is not a grant or bounty.

Suppose that a nation levies no tax at all on commodities. A manufacturer then can export the commodities without tax, and his cost is unaffected by governmental action. No one would say that the failure of a nation to impose an excise or commodity tax—usually called an indirect tax because it pertains

[8] The Department's interpretation was announced on May 6, 1898, less than one year after the statute was enacted. See T.D. 19321, 1 Synopsis of Decisions 696 (1898). Petitioner does not dispute that the interpretation is consistent and of longstanding. For illustrative decisions, see T.D. 19729, 2 Synopsis of Decisions 157, 157–158 (1898); T.D. 20039, G.A. 4261, 2 Synopsis of Decisions 534, 535–536 (1898); T.D. 49355, 73 Treas. Dec. 107 (1938). See T.D. 42895, 54 Treas. Dec. 101 (1928); T.D. 43634, 56 Treas. Dec. 342 (1929).

to and is measured by the value of the goods rather than by the income or wealth of their owner, purchaser or producer—is a bounty or grant on exports.

A Japanese manufacturer is in much the same position as a manufacturer in the nation with no taxes. He may export goods at their cost, which is neither increased nor decreased by governmental action. He is in the same position vis-a-vis United States producers as if there were no taxes. There is no grant or bounty on export; there is simply neutrality.

Petitioner contends, however, that the bounty lies not in any subsidy as that term is usually understood, but in the difference between the treatment of goods intended for the domestic market and goods intended for export. Goods consumed in Japan are taxed by Japan; goods exported are not. According to petitioner, that difference is an incentive to export and amounts to a bounty or grant.

There is a fundamental difference, however, between a subsidy and the remission of an indirect tax. Assume that there are three countries, *A*, *B*, and *C*. In each country, corn can be grown for $1.00 per bushel. Assume further that corn can be shipped at slight cost. Country *A* has no tax on corn. Country *B* places a domestic consumption tax of $.10 on corn. The tax is remitted on exported corn. Country *C* has no tax on corn, but exporters receive $.10 for every bushel exported. In either *B* or *C*, the price of exported corn is $.10 less than the price of corn consumed at home. Petitioner would argue that both *B* and *C* give a

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"bounty" to exported corn, measured by the difference between the domestic price and the export price.

A moment's reflection shows, however, that the schemes of *B* and *C* are quite dissimilar. At break-even prices, corn from *C* can sell in country *A* for only $.90 per bushel, whereas corn from *B* can sell in country *A* for $1.00. *B*'s remission of its consumption tax on the exported corn makes the farmers of *A* no worse off than they would be if *B* had no taxes. The program of country *C*, however, produces disaster for the farmers of *A*, because the grain from *C* corners the market. The difference between neutrality toward exports (as in *B*) and a subsidy of exports (as in *C*) shows up most vividly in *A*.[8]

[8] The following table reflects the selling price of corn in the hypothetical situation we have set out:

	Selling price at destination		
	A	*B*	*C*
Country of origin:			
A	$1.00	$1.10	$1.00
B	1.00	1.10	1.00
C	0.90	1.00	1.00

All sellers are on an equal footing in *C*, but corn from *C* has an advantage in both *A* and *B*. To equalize the situation, countries *A* and *B* would impose countervailing duties of 10 cents on corn from *C*. But if country *A* imposed a countervailing duty of 10 cents on corn from *B*, that corn would be subjected to a disadvantage on sales in *A*. In fact, if *A* imposed a countervailing duty on corn from both *B* and *C*, corn from *C* would continue to enjoy an advantage vis-a-vis corn from *B*.

The hypothetical German corn program discussed above is like the program of country *C*. The remission of the Japanese Commodity Tax is like the program of country *B*. And the effect on producers in the United States (country *A*) is very different. Even though, as petitioner points out, there is a 10 cent differential between the export price and the domestic price in both *B* and *C*, one is a bounty and the other is not.

The difficulty with petitioner's argument is further illustrated by the application of the sales tax. For example, suppose that both New York and California impose sales taxes of five percent on television sets. A set manufactured in New York and sold in New York is subject to a five percent tax; if it is "exported" (shipped to California) it is not taxed by New York, because it never reaches the point of sale. Is this remission a "bounty" or "grant" by New York that subsidizes exports? No, it is nothing more than a decision of the state to leave commerce alone. Indeed, under the Constitution a state could not collect a tax on exports, because, as this Court has held, such a tax would burden interstate commerce.[9] Non-imposition of the tax is necessary in order to achieve neutrality.

Once the New York television set reaches California, it is subject to California's sales tax. Sets manufactured in California and sold in that state also are taxed by California, and this puts New York and

[9] Compare *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, with *National Bellas Hess, Inc.* v. *Illinois Revenue Department*, 386 U.S. 753, and *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359, 363.

California manufacturers on an equal footing. Manufacturers in either State are taxed only once, in an equal amount, at the rate prevailing in the state of sale.

If New York were to collect a tax on sets manufactured there and shipped to California, the same set (assumed to cost $100 without tax) would be taxed twice: (1) a set manufactured in New York and sold in New York would cost $105 ($100 plus the five percent New York sales tax); (2) a set manufactured in California and sold in California would cost $105 ($100 plus the five percent California sales tax); but (3) a set manufactured in New York and sold in California would cost $110 ($100 plus a five percent New York tax plus the five percent California tax). This would place New York sets at a disadvantage and burden commerce.[8]

Moreover, if California were to conclude that New York's *failure* to collect its five percent sales tax on

[8] The illustrations in this brief assume that all manufacturers' costs are the same. The argument would not be affected if New York manufacturers' costs were lower than those of California manufacturers. In that event, New York manufacturers would enjoy a competitive advantage, but it is only appropriate that the lowest-cost seller have the advantage, because that seller uses less of society's resources to make the product, and cost savings should be rewarded with sales. In international trade, when a political decision is made to cancel the advantage of a low-cost producer, that is done through tariffs. The countervailing duty is not designed to place low-cost producers at any disadvantage, however; its role is to ensure that price fairly reflects cost and to cancel artificial advantages conferred by export or production subsidies. Because the countervailing duty is unrelated to cost differences, we have assumed equal cost in the examples for purposes of simplicity.

sets sent to California were a "bounty" (because sets sold in New York would cost $105 but sets could be shipped out at a cost of $100), and if California then were to collect a "countervailing" tax, there would again be double taxation. New York sets sold in California would cost $110 ($100 plus the five percent "countervailing" tax at the time of entry into California plus the five percent California tax at the point of sale). The imposition of a countervailing California tax thus would produce, not neutrality, but a decided advantage for California manufacturers.

The situation is the same if the states have unequal taxes. New Hampshire has no sales tax. A television set manufactured in New York and sold in New Hampshire costs only $100, because it is not taxed; the same set sold in New York would cost $105 ($100 plus the five percent sales tax). Manufacturers of the two states still are on an equal footing: New Hampshire manufacturers can sell a set for $100 in New Hampshire or $105 in New York, the same price at which New York manufacturers can sell. But if New Hampshire were to declare that the failure of New York to collect its tax on exported sets is a "bounty" and to impose a countervailing tax, then New York manufacturers would face a disadvantage. New York-made sets would sell for $105 in New Hampshire, while New Hampshire-made sets would sell for $100 there.

The same thing would happen if California had a 20 percent tax rather than a five percent tax. If New York were to impose a "countervailing" tax on

California-made sets because California does not tax exports, a California-made set would sell in New York for $125 ($100 plus $20 countervailing tax plus five percent sales tax), while sets made in New York would sell for only $105 in New York. Levying a sales or consumption tax on exported sets, or a countervailing tax, thus creates a hornet's nest of inequalities.

The Japanese Commodity Tax acts just like a sales tax. It is a tax imposed on the goods themselves and could be collected either at the point of sale (as a sales tax is collected) or as the goods leave the manufacturer. Japan chooses to impose the tax as the goods leave the place of manufacture, evidently to facilitate collection. But the point at which a tax is levied has no economic consequence, and so, if the failure to collect a sales tax on goods that are not sold within the jurisdiction is not a bounty or grant, the failure to collect the Japanese Commodity Tax on goods not sold in Japan is not a bounty or grant. The similarity of the Japanese Commodity Tax to a sales tax is made more evident by the fact that the tax is collected on imports; that is, it is collected on all goods (or a particular type) sold in Japan, regardless of where the goods were made. It is an absolutely neutral tax. Japan collects its commodity tax on all goods sold there; the states collect their sales taxes on all goods sold here. Although the Japanese commodity tax is higher than the sales taxes of most states, it acts in principle the same as the difference between New York and California taxes in the example immediately above.

All indirect taxes imposed by a state or nation with respect to particular goods are governed by this principle. Accordingly, the failure of any state or nation to collect an indirect tax on exported goods is not a bounty or grant. It is simple neutrality, the avoidance of double taxation.[9] On sales in the United States, both Japanese goods and American goods are exposed to the sales tax of the states but not to the Commodity Tax. On sales in Japan, both Japanese goods and American goods are exposed to the Commodity Tax. The manufacturers are on an equal footing in either country. The remission of an indirect tax will rarely be offset exactly by the domestic tax imposed by the importing nation, but equivalence is unnecessary. Whether or not the taxes are the same, the manufacturers in both states or countries are on an equal footing in competing for sales in both states or countries.

The bright-line test adopted by the Secretary is correct as a matter of principle and essential as a rule of administration. It is difficult if not impossible to determine the real incidence of taxes,[10] and so the

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[9] This proposition, like the Secretary's interpretation, is of long standing. See Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, Book IV, ch. IV (1776); 4 Ricardo, *Works and Correspondence* 216 (Straffa ed. 1961).

[10] See Harberger, *The Incidence of the Corporation Income Tax*, 70 J. Pol. Econ. 215 (1962); McLure and Thirsk, *A Simplified Explanation of the Harberger Model—I: Tax Incidence*, 28 National Tax J. 1 (1975); Barzel, *An Alternative Approach to the Analysis of Taxation*, 84 J. Pol. Econ. 1177 (1976). See also Senate Committee on Finance, *Executive Branch GATT Studies*,

rule applied by the Secretary has been adopted by every major trading nation of the world in order to

93d Cong., 2d Sess. 11–12 (1974) (quoted at Pet. App. 74a n. 19). In the case of indirect taxes, all of the tax should be born by the consumer if the manufacturing and selling industries are perfectly competitive and if all of the factors of production are being employed at marginal cost. Ordinarily there is a presumption that the factors of production are so employed; otherwise some other industry would bid them away and put them to better use. An indirect tax imposed in these circumstances cannot lead the manufacturer to reduce his own costs or bear any part of the tax; it is "shifted forward" to the consumer, and the resulting decline in sales (because of the higher price) leads to lower production. But if the factors of production are uniquely suited to a particular industry, or if the tax is less than the amount by which the factors are more profitably employed in the industry than anywhere else, then the factors could not profitably be shifted elsewhere when higher prices led to lower sales. The manufacturer employing such factors of production would absorb some of the tax in order to avoid increased prices and reduced sales. (In economic language, the tax would fall on the economic rents the manufacturer enjoys from the specialized factors of production.) An indirect tax of ten percent might lead to no increase in price at all if all factors of production were specialized and the economic rent exceeded the value of the tax.

It is difficult to determine the extent to which factors of production are so specialized that they yield economic rents; the problem is unsolved by modern economists, although they suspect that economic rents are rare, and that indirect taxes thus usually are born by consumers. But regardless of the incidence of taxes that are levied, the fact remains that the non-levy of a tax is essentially neutral.

The difficulty in determining incidence is compounded in the case of direct taxes (levied on a person or corporation with respect to income or wealth) by the difficulty of apportionment. If part of a direct tax is remitted, it is almost impossible to ascertain to what extent the remission is attributable to exports and whether it is "excessive" (what is, whether the remission lifts more than the tax initially imposed). Because of these problems, the Secretary traditionally has viewed remission of direct taxes as a bounty or grant on export.

facilitate the free flow of international trade.[11] Expectations have been created, and entire economic systems built, on the assumption that this is the proper treatment of indirect taxes. As we now show, the Secretary's position carries out the intent of Congress.

B. THE LEGISLATIVE HISTORY OF SECTION 303 DEMONSTRATES THAT CONGRESS DID NOT INTEND THE STATUTE TO APPLY TO THE NONEXCESSIVE REMISSION OF INDIRECT TAXES

The court below concluded (Pet. App. 70a) that nothing in the legislative history of the countervailing duty statute "indicates a congressional intent that countervailing duties must be imposed in response to a nonexcessive remission of an excise tax, the condition now before us." While that conclusion is correct as far as it goes, we submit that the legislative his-

[11] The remission of indirect taxes—and the failure to impose any countervailing duty—has been accepted international practice since the 18th century (see, *e.g.*, 126 Consol. Treaty Series 178, 181) and has been a feature of our own excise tax laws since 1789. See 1 Stat. 26 (1789); 1 Stat. 199 (1791); 26 U.S.C. 5062, 5706. The practice has been adopted in the General Agreement on Tariffs and Trades, to which every major trading country adheres. Article VI(4) of the GATT, 61 Stat. A24, provides that "no product * * * imported into the territory of any other contracting party shall be subject to * * * countervailing duty by reason of the exemption of such product from * * * taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such * * * taxes." The Japanese Commodity Tax is a consumption tax.

We do not content that GATT provisions, which are trade agreements entered into by the President under general statutory authority (see 19 U.S.C. (Supp. V) 2102), would supersede statutes like Section 303 in the event of conflict. The adherence of the United States to GATT, including Article VI(4), however, is significant. See pages 28–30, *infra*.

tory—to which petitioner does not refer—affirmatively establishes that Congress intended that countervailing duties were not to be imposed with respect to such remissions.

Congress' intent is reflected in the evolution of the statutory language and in the explanations of the legislation set forth in the congressional debates. The statutory obligation to impose countervailing duties first appeared in a provision of the sugar tariff of 1890 (Paragraph 237 of the Act of October 1, 1890, 26 Stat. 567, 584; Br. in Opp. App. 1A) that was enacted in response to practices of European governments seeking to encourage sugar exports. The countervailing duty provision stated that all imported sugars above a certain grade:

> shall pay one-tenth of one cent per pound in addition to the rate herein provided for, when exported from, or the product of any country when and so long as such country pays or shall hereafter pay, directly or indirectly, a bounty on the exportation of [certain grades of] sugar * * *.

The record of the debate on the 1890 sugar tariff clearly demonstrates that what Congress understood by "bounty" was remissions (or "drawbacks") of indirect taxes *exceeding* the taxes the exporters had paid on the articles. Senator Gibson, who criticized the European practices at length (see 21 Cong. Rec. 9529–9536 (1890)), appended to his remarks a description of "The Bounty Systems In Europe" (21 Cong. Rec. 9537 (1890)), which noted, for example,

that French sugar manufacturers paid a single excise tax of $97.06 per gross ton, "[b]ut upon the export of a ton of sugar he received back as a drawback $117.60, making a clear bounty of $20.54 per gross ton of sugar exported." The "bounties" paid by Germany, Austria and other European governments were similarly described (*ibid.*).[12] Congress thus saw as a "bounty" only the remission or drawback of taxes that exceeded the taxes paid; the remission of the taxes actually paid was not considered a bounty on exportation that would be subject to additional duty.

In 1894 the countervailing duty provision was reenacted in largely the same form, but Congress added the following proviso, presumably to incorporate expressly the earlier understanding:[13]

> *Provided,* That the importer of sugar produced in a foreign country, the Government of which grants such direct or indirect bounties, may be relieved from this additional duty * * * in case said importer produces a certificate of said Government that no indirect bounty has been received upon said sugar *in excess of the*

[12] The description of the German system noted that Germany imposed two excise taxes on sugar, a "consumption" tax and a "material" tax. The discussion of the "bounty" focused only on the remission of the "material" tax, and, as in the case of France, defined the bounty in terms of the excess of the remission over the tax paid. It is also significant that, although Senator Gibson's description noted that Germany did not collect "consumption" taxes on sugar that was exported, it did not regard that failure as a bounty.

[13] Paragraph 182½ of the Act of August 27, 1894, 28 Stat. 509, 521.

tax collected upon the beet or cane from which it was produced * * *. [Emphasis supplied.]

Again the debates confirm that Congress understood the term "bounties" to apply only to the excessive remission of excise taxes. 26 Cong. Rec. 5705–5706 (1894).

In 1897 the statute was revised and made applicable to all imported products (Section 5 of the Tariff Act of July 24, 1897, 30 Stat. 205). The proviso in the 1894 statute was deleted, and the statute modified to provide, as Section 303 provides today, that "there shall be levied and paid * * * an additional duty equal to the *net* amount of such bounty or grant * * *" (*ibid.*; emphasis supplied).

The floor debates on the 1894 and 1897 statutes demonstrate that the phrase "net amount of such bounty or grant" added by the 1897 statute was meant to incorporate the principle, expressly set forth in the 1894 proviso, that only excessive remissions of indirect taxes trigger the obligation to impose a countervailing duty.

In the Senate debate on the 1894 proviso, Senator Jones, author of that provision, gave as an illustration the case of Germany, which he understood to pay exporters 21½ cents per hundred pounds of sugar exported but imposed an internal tax of about 15 cents per hundred pounds, so that "there is a net bounty on the exportation of refined sugar of six and a half one-hundredths of a cent [per pound]." 26 Cong. Rec. 5705 (1894). In the debate on the 1897 statute, Senator Allison, sponsor of that provision,

advised Senator Jones that "this countervailing duty is only an imitation and an emulation of [your] own committee in 1894 * * *" (30 Cong. Rec. 1719 (1897)) and later stated that his proposal was concerned only with "the net bounty, less the taxes and reductions which I have named" (*id.* at 1721). The same understanding is reflected throughout the debates.[14] Indeed, if that were not Congress' understanding, the addition of the phrase "net amount of such bounty or grant" would have little meaning.

In sum, the legislative history of each version of the statute reflects the consistent understanding of

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[14] Like the debates on the 1894 version of the statute, the 1897 debate focused on German sugar exports, and, as earlier, the figures cited for the "bounties" paid by Germany did not include an amount to account for the fact that Germany remitted or did not collect its internal tax on exported sugar (see 30 Cong. Rec. 1650, 1658, 1674, 1680, 1694, 1719, 1729, 1721–1722 (1897)), although Congress was aware of the fact (26 Cong. Rec. 784 (1894) (Senator Quay)); 26 Cong. Rec. 5706 (1894) (Senator Jones); 30 Cong. Rec. 1646 (1897) (Senator Vest)).

The version of the 1897 statute that originally passed the House expressly included a proviso that the bounty was to be measured by the excess of the remission over the excise tax paid. See 30 Cong. Rec. 1634 (1897). Although the Senate Committee on Finance proposed the more general language that now appears in the statute (30 Cong. Rec. 1635 (1897)), the reasons for that proposal are not clear. The Senate's debates on the more general version suggest that it was to accommodate certain German protests to the House version (see 30 Cong. Rec. 2203, 2213, 2223, 2224 (1897)), rather than to alter the general understanding that bounties consisted only of excessive remissions. (It is hardly likely that the Senate would have responded to German protests by altering the statute so as to treble the size of the countervailing duty on German sugar. At a minimum, if that were the Senate's purpose, someone would have said so.)

Congress that the grants or bounties intended to be subject to countervailing duties consist only of payments in excess of taxes collected and do not include the failure to collect taxes or the nonexcessive remission of taxes.

C. THE SECRETARY'S CONSISTENT INTERPRETATION AND APPLICATION OF SECTION 303 FOR 30 YEARS HAS BEEN RATIFIED BY CONGRESS' REPEATED REENACTMENT OF SECTION 303 WITH KNOWLEDGE OF THE SECRETARY'S INTERPRETATION

1. *The administrative practice is longstanding and consistent and Congress has ratified it*

Since 1898 the Secretary has consistently interpreted Section 303 as not requiring the imposition of countervailing duties with respect to the remission of indirect taxes (see note 5, *supra*). Congress has reenacted Section 303 without material change five times since 1897 with knowledge of the Secretary's interpretation (see Pet. Br. App.).[15] Indeed, in 1973, in the course of its most recent consideration of the statute, Congress was specifically apprised of the remission of the Japanese Commodity Tax and of petitioner's countervailing duty petition, which was

[15] Tariff Act of 1909, 36 Stat. 85; Tariff Act of 1913, 38 Stat. 192; Tariff Act of 1922, 42 Stat, 985; Tariff Act of 1930, 46 Stat. 687; Trade Act of 1974, 88 Stat. 2049.

The record reflects the fact that Congress was explicitly notified of the Secretary's interpretation of the statute no later than 1949. See Hearings on the Extension of Reciprocal Trade Agreements Act before the Senate Committee on Finance, 81st Cong., 1st Sess. 1195, 1205 (1949). Although this is the first specific record, it is difficult to believe, as the court below noted (Pet. App. 77a), that Congress had earlier re-enacted the statute four times without informing itself of Treasury's practice.

then pending before the Secretary."[16] A witness requested an amendment to the statute in order to require the Secretary to countervail the nonexcessive remission of a tax."[17] Congress refused to adopt the amendment and reenacted the relevant statutory language without change. Pub. L. 93-618, 88 Stat. 2049. Moreover, as we have noted (note 11, *supra*), the Secretary's position is expressed in international agreements to which the United States is a party.

If there were any doubt about Congress' intent when it first enacted the statute—and we think that there is none—the pattern of reconsideration and reenactment of the statute without change should resolve those doubts in favor of the Secretary's interpretation. The long-standing construction of a statute by the agency charged with its administration is entitled to great weight, particularly when, as here, that construction was first adopted shortly after the statute was enacted. See, *e.g.*, *Saxbe* v. *Bustos*, 419 U.S. 65, 74; *Udall* v. *Tallman*, 380 U.S. 1, 16; *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408.

The deference should be particularly great where Congress has reenacted the statute without change and

[16] See Hearings on H.R. 6767 before the House Committee on Ways and Means, 93d Cong., 1st Sess. 2169–2171, 2496–2500, 3097, 3292–3293, 3814–3815 (1973).

[17] See Hearings on H.R. 6767, *supra*, at 2169–2171, 2496–2500, 3097, 3292–3293, 3814. See also Hearings on World Trade and Investment Issues before the Subcommittee on International Trade of the Senate Committee on Finance, 92d Cong., 1st Sess. 102, 109–111 (1971).

with knowledge of the administrative interpretation. This circumstance supports the presumption that Congress has ratified the interpretation. See, *e.g., Lorillard* v. *Pons,* No. 76–1346, decided February 22, 1978, slip op. 5; *Saxbe* v. *Bustos, supra; Helvering* v. *Winmill,* 305 U.S. 79, 83. The Secretary's "reading and application of the statute involved in this case * * * are long established, have remained undisturbed by Congress, and fall well within that category of situations in which the courts should defer to the agency's understanding of the statute which it administers." *National Labor Relations Board* v. *Enterprise Association,* 429 U.S. 507, 528.

Petitioner does not dispute the vintage or consistency of the Secretary's interpretation, and it does not dispute Congress' repeated reenactment of the statute without change. Petitioner argues instead that Congress' actions must be deemed to be neutral, if not hostile, with respect to the merits of the Secretary's interpretation (Br. 19–36). Petitioner relies primarily on statements in recent committee reports considering a different statute (Br. 25); on the recent enactment of provisions providing for judicial review of negative countervailing duty determinations (Br. 28–32); and on Congress' failure expressly to codify the Secretary's interpretation when he requested such a codification (Br. 20–21).

None of those grounds supports the inferences petitioner draws.[18]

[18] Petitioner's reliance (Br. 25) on statements in committee reports in 1973 and 1974 expressing neutrality on the merits of the Secretary's practice under Section 303 is unwarranted. Those reports were in connection with amendments to another statute, the Anti-Dumping Act of 1921, 42 Stat. 12, 19 U.S.C. 162, not in connection with the 1974 reenactment of Section 303. Moreover, if any inference is appropriate with respect to Congress' actions concerning the Anti-Dumping Act, it is favorable to our position, because, as petitioner admits (Br. 25), Congress adopted an amendment to the Anti-Dumping Act that the Department had requested for the express purpose of conforming the standards under that Act to the distinction between remission of direct and indirect taxes employed under Section 303.

This is also no basis for petitioner's reliance on Congress' failure to enact an amendment requested by the Department in 1950 that would have codified the Secretary's interpretation. As the court below noted (Pet. App. 77a–78a), but petitioner overlooks, the principal objection to that amendment related to a feature of the amendment that would have changed existing practice by creating a requirement that countervailing duties be imposed only when domestic injury is shown; there was no serious objection to the requested codification of existing practice. See Hearings on H.R. 5505 before the Senate Committee on Finance, 82d Cong., 2d Sess. 115, 124–125 (1952).

The 1974 amendments providing time limits for countervailing duty determinations, judicial review, and other requirements, also relied on by petitioner (Br. 27–36), have no bearing on the issue in this case.

Moreover, nothing in the events to which petitioner refers undermines the presumption that properly is drawn from Congress' reenactment of the statute. When Congress knows that the Secretary is interpreting and applying a statute in a certain way, and has been doing so for 80 years, and it then reenacts the statute without change, it would make no sense to think that Congress is hostile, or even neutral, with respect to that interpretation.[19] Reenactment of a

[19] As the court below put it (Pet. App. 77a): "we find it difficult to believe that Congress would harbor in its breast a disapproval of an administrative practice for almost 80 years, while remaining so supine or irresponsible as not to change it."

statute with a well-known administrative construction must be viewed as acquiescence in the interpretation; otherwise Congress would have changed the statute.

2. *International trading relationships have been built on the consistent administrative interpretation of the statute*

Deference to the administrative construction of a statute is most appropriate when private relationships have grown up in reliance on that longstanding construction. Much international trade is based on the premise that the Secretary is right, and that nonexcessive remissions of indirect taxes are not subject to countervailing duties. The international trading system is based in substantial measure on United States law, and our trading partners have come to rely on the Secretary's rule. It has been embodied in the General Agreement on Trades and Tariffs (the GATT), which is followed by all major trading nations.[20]

A change in the position of the United States would have immediate and adverse effects on international trade. Indirect taxes have reached substantial levels in most major nations; these levels were fixed, at least in part, with the understanding that they would be applied only to domestic sales.[21] If countervailing du-

[20] See note 11, *supra*.

[21] For the United States, revenue from indirect taxes grew from 1.2 percent of GNP in 1902 to 4.7 percent (1974); in the United Kingdom from 1.8 percent (1900) to 9.0 percent (1974); in Germany from 1.0 percent of Net National Product (1900) to 9.0 percent of GNP (1974); in Canada from 5.0 percent of GNP (1911) to 9.6 percent of GNP (1974); and in Japan from 2.0 percent of National Income (1900) to 3.3 percent of GNP (1974). The foregoing statistics are derived from the following sources:

ties must be imposed whenever indirect taxes are remitted on exports, enormous sums of duties would be levied. In the short run, the prices of imported goods in the United States would increase substantially—by 33 percent for some goods.[22] In the long run, there would be significant economic dislocations here and abroad, as established trading patterns were disrupted, with consequent loss of employment in particular countries and industries. Our trading partners then could exercise their right, under Article XXIII of GATT, 61 Stat. A64–A65, to retaliate by imposing higher duties of their own. If there ever

Historical Statistics of the United States, Colonial Times to 1970, U.S. Department of Commerce, Bureau of the Census; *Hundred Years Statistics of the Japanese Economy*, Statistics Department, Bank of Japan, July 1966; *Revenue Statistics of OECD Member Countries*, 1965–1974, OECD 1976; *European Historical Statistics* 1750–1970, B.R. Mitchell, Columbia University Press, N.Y. 1976; *Historical Statistics of Canada*, Ed. M.C. Urquhart, MacMillan Co. of Canada Ltd., 1965. In addition, the Commerce Department estimates that, based on trade and tax data of 16 of our largest trading partners, the value of United States imports in 1976 on which indirect taxes were remitted or exempted on export exceeded $50 billion.

[22] Based on the indirect tax rates of the exporting nation, the prices of some goods we import would be likely to increase as follows: Japanese sporting equipment by 30 percent and cameras by 16 percent; French luxury goods by 33.3 percent and wines by 17.6 percent; most goods from West Germany by 11 percent; most goods from Canada by 12 percent; and most goods from the Netherlands by 18 percent. By comparison, the current average United States duty on imported goods is 3.9 percent. In short, petitioner's construction of the countervailing duty statute would virtually reenact the calamitous Smoot-Hawley Tariff of the 1930s, when duties averaged about 17 percent on imported goods. USITC: "Value of U.S. Imports for Consumption, Duties Collected, and Ratio of Duties to Values, Under the Tariff Act of 1930, 1930–1976."

were a case in which the Court should defer to the Secretary's interpretation of the statute he administers, and leave to Congress the task of changing the governing rules, this is that case.

Against all of this, petitioner argues that Congress, for so many years, has not been accepting the Secretary's interpretation of the statute at all, but has approved by acquiescence this Court's decision in *Downs* v. *United States,* 187 U.S. 496. But none of the materials on which petitioner relies indicates that Congress was aware of, let alone that it approved, petitioner's interpretation of *Downs.* That interpretation, as we show below, is erroneous. The evidence shows at most that some language in *Downs* created uncertainity. But there has never been any uncertainty about how the Secretary was interpreting and carrying out the statute, and world trading has depended on the Secretary's interpretation for almost 80 years. Because the Secretary's interpretation controlled how the statute operated in practice, it is the Secretary's interpretation that Congress must have accepted when it reenacted the statute without telling the Secretary to change his views.

D. THE ADMINISTRATIVE INTERPRETATION OF THE STATUTE IS CONSISTENT WITH THE DECISIONS OF THIS COURT

Petitioner's argument depends almost exclusively on the following passage of *Downs* v. *United States, supra,* 187 U.S. at 515:

> When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation.

The passage of *Downs* cannot be lifted from its context, however, and in context it does not support petitioner.

Downs involved the Russian sugar tax. The Secretary imposed a countervailing duty, following the same interpretation of our statute that he followed here, and the importer sought judicial review. The Russian system was very complicated, but it had two features that were significant. (1) The domestic excise taxes were remitted for all sugar exported; and (2) the exporter received a certificate entitling him to sell *additional* sugar in Russia without paying all of the excise tax on those domestic sales. The certificate had an ascertainable market value, which depended on the amount of tax that was forgiven for domestic sales. The Secretary imposed a countervailing duty equal *only* to the value of the certificate; the duty did not pertain to the amount of tax remitted for exports. In other words, the bounty was identified as the amount of excessive remission.[23]

The amount of the bounty was not at issue in *Downs,* and so neither the parties nor the Court paid partic-

[23] See A. 49–51, a memorandum from the Secretary of the Treasury that was included in the record in *Downs.* This memorandum reflects the way in which the bounty was measured by the market value of the certificates. The lower court opinions in *Downs* also discuss this fact. See 2 Treas. Dec. 996; 4 Treas. Dec. 184; 113 Fed. 144.

ular attention to the difference between the remission of the excise tax and the issuance of a certificate (the excessive remission). But the Court's opinion strongly suggests that it recognized the distinction, for it stated (187 U.S. at 515) that "[t]he amount [the exporter] receives for his export certificate [on the market], say, R. 1.25, is the exact amount of the bounty he receives upon exportation * * *." Moreover, the Court concluded its opinion by stating (*id.* at 516):

> In this connection the Circuit Court of Appeals found: "That the Russian exporter of sugar obtained from his government a certificate, solely because of such exportation, which is worth in the open market of that country from R. 1.25 to R. 1.64 per pood, or from 1.8 to 2.35 cents per pound. Therefore we hold that the government of Russia does secure to the exporter of that country, as the inevitable result of its action, a money reward or gratuity whenever he exports sugar from Russia." We all concur in this expression of opinion.

These two statements bracket the single sentence on which petitioner relies.[24]

[24] See also the statement at 187 U.S. at 512: "It is practically admitted in this case that a bounty equal to the value of * * * [the] certificates is paid by the Russian government, and the main argument of [*Downs*] is addressed to the proposition that this bounty is paid, not upon exportation, but upon production." The Court's description of Downs' main argument refers to the fact that the statute at that time provided for the imposition of countervailing duties only when bounties were paid upon exportation but not upon production. The statute was amended in 1922 to encompass bounties on manufacture and production as well. 42 Stat. 935. That change is not significant for purposes of this case (see 61 Cong. Rec. 4132 (1922) (Rep. Hawley)).

We do not know, and cannot tell at this remove, what the Court meant by the statement that all remissions of taxes are bounties. But the statement was not responsive to the arguments of the parties or to the issues in the case.[25] It does not fit comfortably with the statements immediately before and after it in the opinion. It is perhaps best understood as unguarded language that was not informed by the focus of adversarial presentation. It therefore does not control here. See, *e.g.*, *Barrett* v. *United States*, 423 U.S. 212, 222–224. The opinion as a whole supports the Secretary's interpretation and, after all, the Court affirmed the Secretary's decision.

[25] See the briefs in *Downs* v. *United States*, No. 318, October Term, 1902. The brief for the United States said that the only question presented was whether the Russian scheme as a whole created a bounty (Br. 1). The brief asked how the premium appears (Br. 7) and answered the question by saying (Br. 8) that the "assignment or transfer carries a consideration [the certificate] to the producer who cedes his home market right, and constitutes the concrete evidence of the premium or indirect bounty on exportation." The rest of the brief discussed the details of the Russian system. The brief distinguished "drawbacks" from excessive remissions (Br. 23), stating that drawbacks were not improper (although conceding (Br. 24) that we could not resist if some other nation wanted to impose a countervailing duty on account of remissions). The brief for Downs generally urged that the Russian system was simply a method of maintaining strict state control over domestic sugar in all aspects of production and had no effect on exports. The brief paid particular attention to the market value of the certificate (Br. 26–37) and little attention to the consequences of a remission standing alone.

Finally, it is significant that the contemporaneous judicial construction of the statute agreed with that of the Secretary. The only case construing the statute before *Downs* was *United States* v. *Hills Bros. Co.*, 107 Fed. 107 (C.A. 2). *Hills Bros.* explicitly recognized that the countervailing duty was assessed only on a remission of excise taxes exceeding the taxes paid (107 Fed. at 108–109).

The other early cases follow the same pattern. *G. S. Nicholas & Co.* v. *United States*, 249 U.S. 34, involved the imposition of a countervailing duty on whiskey and gin imported from Great Britain. The British government not only remitted domestic taxes on exports but also paid the exporter a premium of three pence on plain spirits and five pence on compounded spirits (249 U.S. at 36). The Secretary imposed a countervailing duty equal only to the premium; the remission of the excise tax was not involved in the case.[26] When the case reached this Court, the only open question was whether the premium could be seen as a legitimate offset for unique storage and other taxes imposed by Great Britain and hence not an "excessive" remission. The Court rejected that argument. It concluded that the payment was a bounty and the

[26] Petitioner concedes (Br. 17) that both the Board of General Appraisers and the Court of Customs Appeals explicitly stated in *Nicholas* that the case presented no question whether the remission of excise taxes, standing alone, would be a bounty. These statements not only demonstrate the limited scope of the issue in *Nicholas* but also demonstrate the understanding these courts had of *Downs:* they did not understand that *Downs* stood for the proposition that all remissions of indirect taxes are bounties.

ability of the Secretary to impose a countervailing duty was not defeated by the possibility that the British government had good reasons for wanting to promote exports (249 U.S. at 39–40). Here, too, although some language in the opinion appears to look in petitioner's favor, the language cannot be detached from its context—a context in which the Court affirmed the Secretary's decision to follow the same approach that he has taken here of imposing countervailing duties only on excessive remissions."[27]

E. THERE IS NO NEED FOR A FACTUAL HEARING

Petitioner argues (Br. 36–43) that the decision below was erroneous because, in petitioner's view, it was based on the court's "presumption" that the Secretary had determined that, as a matter of economic fact, the nonexcessive remission of an indirect tax does not encourage exports. Since the Secretary did not make a specific finding of fact with respect to the economic consequences of the remission of the Japanese Commodity Tax (see A. 24–25), petitioner contends that it

[27] *United States* v. *Passavant*, 169 U.S. 16, which also is cited by petitioner (Br. 14 n. 8), offers even less assistance to its position. *Passavant* did not involve countervailing duties at all; it involved the question whether a statute that required import duties to be calculated on the basis of the "actual market value or wholesale price" of the imported article in the markets of the exporting country meant that the market values were to be reduced by the amount of excise taxes remitted on export. That issue has no bearing on whether remission is a bounty. Moreover, the holding of *Passavant*—that "actual market value" was to be computed without regard to remissions—was subsequently reversed by Congress. See 70 Stat. 943, presently codified at 19 U.S.C. 1401a(d).

is inappropriate to direct summary judgment for the government.

Petitioner's argument is erroneous. As the court below stated (Pet. App. 69a), it "presumed" that the Secretary had determined that the remission of the Commodity Tax does not have the effect of a bounty or grant because

> [t]he factual underpinnings of the Secretary's negative countervailing duty determination in this case are not under attack. On the contrary, the sole question on this appeal is whether the mere remission of the Japanese Commodity Tax must be deemed a bounty or grant as a matter of law.

Indeed, petitioner argues in this Court that the issue is solely one of law (Br. 36–37) and has consistently adhered to that position throughout the litigation.[28]

In any event, petitioner and *amicus* Ford Motor Co. appear to misconceive the relevant issue. This case does not turn on the precise economic consequences of tax remissions. The issue is whether the Secretary, in interpreting the statute, has adopted a classification that is reasonable in light of the statutory purpose. It is commonplace and essential for administrators, in construing and applying their statutes, to adopt general classifications to implement the statutory purpose. Once an administrator does so, the courts must decide

[28] See, *e.g.*, Plaintiff's Reply Brief And Memorandum In Opposition To Defendant's Cross Motion For Summary Judgment, p. 37.

whether the classification of persons or transactions subject to regulation is reasonable, and whether a person or transaction falls within the class (an issue that is not disputed here);[29] the issue is not whether the regulatory treatment of each and every person or transaction within a reasonable class itself serves the statutory purpose. See, *e.g.*, *Mourning* v. *Family Publications, Inc.*, 411 U.S. 356, 374.[30]

The same principle applies here. The Secretary has formulated classifications of events. One class is the remission of taxes imposed on or with respect to a product ("indirect taxes") and another class is the remission of taxes imposed on or with respect to the producer ("direct taxes"). Those classifications,

[29] There is no dispute, nor could there be, that the Japanese Commodity Tax clearly falls within the class of "indirect taxes," as that class has been understood and applied throughout the long course of the administration of the statute. There may be cases where there is a genuine dispute about whether a particular tax that is remitted is properly deemed an indirect tax, but there is no merit to the contention of *amicus* Ford that all such possible disputes should be decided in this case, where the issue is not presented.

[30] Suppose, for example, that a statute designed to discourage nonessential use of vehicles imposes an excise tax of a certain amount on all sales of "recreational vehicles." It would certainly be reasonable for the tax collector to formulate classes of vehicles that would be subject to the tax (*e.g.*, golf carts) and classes not subject to the tax (*e.g.*, trucks), even though a particular purchaser of a golf cart might use it only for business and a purchaser of a truck might use it only for recreation. And whether the administrator may assess the tax on the sale of a golf cart is a question of law that depends on the reasonableness of his classification; it is not a question of fact that would require a determination in each case of the end use of the product purchased.

and the conclusion that nonexcessive remission of indirect taxes is not a bounty, were reasonably based on the premise—undisputed by petitioner—that indirect taxes are generally imposed by the country of consumption and that their remission by the exporting countries is essentially neutral and serves to avoid double taxation.[31] See pages 9–19, *supra.*

In short, the issue here is whether that classification and its premises are reasonable in light of the statutory purpose. It is a question of law. Neither the Secretary nor the court need decide whether the remission of a particular tax is exactly counterbalanced by the imposition of similar taxes by the importing country, or each state where the product might be sold, or the degree to which a particular Japaneses manufacturer absorbs the Commodity Tax or shifts it forward to consumers. Those questions may not be answerable, given the present state of economic knowledge (see note 10, *supra*). And it would be cumbersome to administer the statute (or indeed to conduct international trade) if such factual determinations had to be made in each case, even if they are relevant and could be made. As the Court noted in *Mourning* v. *Family Publications, Inc., supra,* 411 U.S. at 374, any such requirement would

[31] That is not to say that the classifications employed by the Secretary are necessarily the only reasonable classifications that could be drawn in light of the statutory purpose, although the purpose and legislative history of the statute strongly indicates their conformity to the legislative understanding. The classification need only be "sufficiently reasonable that it should [be] accepted by the reviewing courts." *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 75.

"unreasonably encumber effective administration [of the statute] * * *."[32]

CONCLUSION

The judgment of the Court of Customs and Patent Appeals should be affirmed.

Respectfully submitted.

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[32] Petitioner and *amicus* Ford also appear now to attack the reasonableness of the Secretary's distinction between direct and indirect taxes, arguing, for example, that the GATT rules incorporating that classification "were premised on false assumptions * * * [and] provide for unfair rather than neutral treatment to nations * * *" (Br. 38 *et seq.*; see also Ford Br. 17–28). Those arguments are erroneous on their merits, but, in any event, such factually-based attacks on the Secretary's determination were not made in the Customs Court; as the court below observed, petitioner made no attack on the factual underpinnings of the Secretary's determination, but rather relied solely on the contention that the mere remission of the Commodity Tax is a bounty as a matter of law. Petitioner cannot have it both ways.

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